

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	.	CA 99-2496
	.	
Plaintiff,	.	
	.	
vs.	.	Washington, D.C.
	.	January 17, 2003
PHILIP MORRIS, INCORPORATED,	.	2:00 PM
ET AL,	.	
	.	
Defendants.	.	
.	

FILED

FEB 5 2003

**NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT**

TRANSCRIPT OF STATUS HEARING
BEFORE THE HONORABLE GLADYS KESSLER
A UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:	SHARON EUBANKS, ESQUIRE
	STEPHEN D. BRODY, ESQUIRE
	DAVID KLONTZ, ESQUIRE
	RENE BROOKER, ESQUIRE
	GREGG M. SCHWIND, ESQUIRE
	UNITED STATES DEPARTMENT OF
	JUSTICE
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1 limitations, to take the depositions that we deem necessary
2 to take to prove our claims and defenses in this case, and
3 focus then on new produced material.

4 And that is simply what we would seek that Your
5 Honor impose here. So I guess the only real extension that
6 we would be seeking is an extension from April 1 until
7 August 1. We believe that that is minimally what would
8 remedy, you know, the situation, and alleviate some of the
9 burden and prejudice to the United States at this late
10 date.

11 THE COURT: Well, I am certainly not pleased to
12 hear what you have to report.

13 Mr. Brody, fill me in on e-mails, and then I will
14 hear from everybody else.

15 MS. BROOKER: Thank you, Your Honor.

16 MR. BRODY: Your Honor, the last time that we were
17 before you we spoke briefly -- I think it was at the October
18 conference, actually, the last quarterly status conference
19 about the United States' identification of the need to take
20 a Rule 30(b)(6) deposition of Philip Morris to find out
21 facts about the matter that was disclosed to you by Mr.
22 Frederick in his letter of June 19th, 2002, that being the
23 fact that certain persons at Philip Morris had failed to
24 print and retain e-mail that was potentially subject to the
25 court's preservation order before the e-mail was deleted in

1 the course of regular monthly system-wide deletions that
2 took place at Philip Morris before they suspected them as of
3 the deletion last March, which was after they had discovered
4 this problem.

5 THE COURT: Well, and you also discussed with me
6 the extent to which it was possible to retrieve those e-
7 mails.

8 MR. BRODY: Exactly. And one of the things that
9 we were hoping to get from the deposition was a sense of
10 what could be retrieved, and I think that one unfortunate
11 thing is that beyond what Philip Morris was able to recover
12 from backup tapes and run through a search that led to
13 Philip Morris making available approximately 200,000 pages
14 of e-mail during October of this year, which they produced
15 in November, beyond that, and beyond resolution -- and we
16 still have yet to hear from them on this -- of whether they
17 were able to recover anything from 54 backup tapes that they
18 happen to find in a room, a storage room somewhere, beyond
19 that it is going to be impossible for Philip Morris to say
20 the anything else can be recovered, that everything has been
21 recovered, that the persons who failed to comply with the
22 company's print and retain policy for the information
23 subject to the preservation order, that the United States
24 has been able to get discovery from all of those persons.

25 One thing that we did find out during the course

1 of the 30(b)(6) deposition is that we are talking about some
2 very significant people. We are not talking about low-level
3 persons at Philip Morris.

4 We are talking about people that include the
5 Senior Vice President for Marketing. We are talking about
6 the Senior Vice President for Corporate Affairs. We are
7 talking about the Vice President of Research and
8 Development. We are talking about the Senior Brand Manager
9 for Marlboro.

10 We are also talking about the Senior Principal
11 Scientist in Research Development and Engineering, who also
12 happens to have been designated as an expert witness in this
13 case by Philip Morris.

14 There are others. There is a list of eleven, and
15 every one of the eleven is a very significant person at
16 Philip Morris. So the loss of relevant material from these
17 persons is something that is very, very significant, and
18 something that we anticipated addressing with the court
19 again after some limited amount of additional investigation
20 into this issue.

21 That is where we are right now.

22 The one other thing that we did learn in the
23 course of the 30(b)(6) deposition is that Philip Morris
24 first became aware of this as a problem, or a potential
25 problem, in February, 2002, and it began an investigation at

1 that time.

2 They became aware of it four months before they
3 notified the court and before they notified the United
4 States of what was going on. And that is the other
5 significant fact that we uncovered during the course of the
6 30(b)(6) deposition.

7 THE COURT: I want to ask a couple of questions.
8 You got, and correct me if I'm wrong, 200,000 pages of
9 retrieved e-mails, is that right.

10 MR. BRODY: Yes.

11 THE COURT: When was that production finally
12 made?

13 MR. BRODY: The documents were made available for
14 our review between October 17th and the 31st of 2002. They
15 were produced to us, the material that we selected from that
16 collection, in mid-November.

17 November 22nd or November 23rd we received all of
18 the materials, and then a few days later we received a
19 replacement set for part of it with confidentiality
20 legends and a line-by-line confidentiality designation as
21 required.

22 THE COURT: So those 200,000 pages have nothing to
23 do with the 270,000 pages that Ms. Brooker was talking
24 about, is that right?

25 MR. BRODY: Correct. The 270,000 pages are a

1 separate set. And Ms. Brooker referenced the 151,000 pages
2 that we are getting today, or we are supposed to get today.
3 That 151,000 pages is part of the 271,000.

4 THE COURT: Yes. I understood that. All right.
5 Anything else you have to report on the issue?

6 MR. BRODY: That is where the issue stands right
7 now.

8 We anticipate approaching Philip Morris based upon
9 the 30(b)(6) deposition and some of the questions we asked
10 that we thought were legitimate areas of inquiry where their
11 particular designee did not know the precise answer to our
12 question but referred us generally to one or two particular
13 people within Philip Morris as persons who would know the
14 answers to those questions, and we are going to approach
15 Philip Morris and see if they will agree to allow us to
16 obtain further discovery from those persons.

17 My thought is that it would just be a couple of
18 every short depositions, you know, of two or three hours
19 duration.

20 THE COURT: I assume, and again Mr. Brody correct
21 me if I'm wrong, that you don't have any sense of the
22 parameters of what cannot be retrieved, is that right?
23 Other than you now know at least some of the individuals,
24 maybe not all of the people, whose e-mails cannot be
25 retrieved.

1 MR. BRODY: That is correct. It seems to be an
2 unfortunate situation, but the company has a policy where
3 backup tapes that are run on their system are, pursuant to
4 policy, overwritten after three weeks, or available to be
5 overwritten after three weeks.

6 So we do not have a situation where we can go back
7 and say, you know, we are going to get all of the backup
8 tapes from the last two years, the last three years, the
9 last four years, the last five years, however long it would
10 have to be, and we are going to reconstruct the e-mail
11 system, and we are going to retrieve everything that was
12 deleted.

13 Due to that policy -- and it is kind of an odd
14 policy to have a situation where you delete your whole
15 system every month.

16 THE COURT: It certainly is.

17 MR. BRODY: But you delete the backup tapes every
18 three weeks.

19 THE COURT: It certainly is I have to say. Three
20 weeks is no time at all. Nothing, especially when we are
21 talking about corporate operations. It's -- well, I will
22 leave it at that.

23 MR. BRODY: Yes.

24 THE COURT: Let me hear from Mr. Frederick about
25 what Philip Morris has to say.

1 MR. FREDERICK: Good afternoon, Your Honor. For
2 the record, Tom Frederick representing the Philip Morris
3 defendants.

4 Obviously there is a lot to address in what Ms.
5 Brooker and Mr. Brody said. There are also some issues that
6 go beyond Philip Morris, and I am certain that others,
7 including Mr. Redgrave, would like to address those
8 separately.

9 In particular it pertains to the government's
10 request for additional depositions of their companies,
11 because they are not in the same situation as we are in
12 document production.

13 Your Honor, I think --

14 THE COURT: I thought -- I thought that the
15 government's request was to extend the time for the Philip
16 Morris depositions.

17 MR. FREDERICK: I think that is correct, Your
18 Honor. However, I am just saying that, as I will get into
19 in a second -- this is later in our agenda, and I am a
20 little surprised it came up here, but be that as it may,
21 there are more general issues pertaining to the government's
22 request for depositions going beyond the Philip Morris
23 defendants and the Philip Morris document production that
24 others would like to address in addition to myself, although
25 I will address those presently.

1 Judge, I think the overarching comment that I
2 would like to start with is that nobody, and most of all me,
3 because I am the one who is standing up here talking to it
4 right now, nobody is happy we are still here today talking
5 about document production issues.

6 By the end of this month we will be done producing
7 documents. There have been a substantial number of
8 documents produced since July 1.

9 Unless the court would like us to, I am not going
10 to stand here -- and I would need some assistance from Ms.
11 Cecil -- I am not going to stand here and go through and
12 respond point by point to Ms. Brooker.

13 I do not think we dispute the overall numbers. We
14 dispute some of the interim facts related to those, but I do
15 not know that that is necessary or appropriate here today.
16 If there is going to be a motion, we can address it at that
17 time.

18 The point I want to drive home to the Judge though
19 and to the court is that this, while very unfortunate that
20 we are in this situation, it has to be placed in the
21 perspective of this case.

22 This is a discovery matter, and I don't mean to
23 suggest that it is not an important discovery matter, but
24 ultimately whether or not it goes to the substance of the
25 case is something else. And I would like the court to keep

1 in mind that the government in this case has enjoyed
2 advantages in discovery, perhaps unsurpassed by any other
3 litigant.

4 They had I think tens -- as I think you said in
5 order 230, 38.8 million pages they have received in this
6 case.

7 They had tens of millions of those pages before
8 they filed this case based on more than five years of very
9 intensive discovery in state attorney general actions bought
10 by not just those state attorney generals but represented --
11 but those state attorney generals were represented by some
12 of the most sophisticated plaintiff's counsel in the
13 country.

14 So I accept the fact that, you know, we have to
15 address the Philip Morris production issues here, but I want
16 to make sure that we do not lose sight of the context; and
17 that is ultimately there is no deficiencies substantively in
18 discovery in this case that impact the overall proof. And I
19 think that that is what the record will show.

20 The government has had ample discovery, and if it
21 cannot prove its claims --

22 THE COURT: I do not think, by the way, that that
23 is necessarily true at all in terms of the e-mail problem.
24 I see that as an insoluble problem. You cannot recreate
25 what has been destroyed. Now that doesn't go to the first

1 part of the problem which is 500,000 pages almost a year
2 beyond that deadline.

3 MR. FREDERICK: Well, Your Honor --

4 THE COURT: But I definitely see a substantive
5 issue, or should say a possible substantive issue, because
6 we are never going to know in terms of what was in those e-
7 mails, and that concerns me greatly.

8 But let's keep to the first part first, which is,
9 how in the world could you find 500,000 pages almost a year
10 late?

11 MR. FREDERICK: Well, first of all, it hasn't been
12 a year late. They did have notice earlier than today of the
13 500,000 pages.

14 THE COURT: A little earlier. A couple of months
15 earlier.

16 MR. FREDERICK: And some of that -- I mean you
17 have to break that question down into particular production.
18 Some of it has to do with the massive nature of the document
19 production and the litigations in which Philip Morris is
20 involved.

21 So if there are productions in another case, when
22 they are done with those we have to go back and look through
23 those, and make sure that we have produced everything that
24 is responsive in this case from that case. And so we
25 discover documents like that.